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4 **UNITED STATES DISTRICT COURT**
5 **SOUTHERN DISTRICT OF CALIFORNIA**
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7 WEIN-UND SEKTKELLEREI JAKOB
8 GERHARDT NIERSTEINER
9 SCHLOSSKELLEREIEN GmbH & Co.,
10 KG, a German limited liability company
11 and MAX DIETER ALTMANN, and
12 individual,

13
14 Plaintiffs,

15 v.

16 FONDA HOPKINS, an individual, and
17 FRANK KRYGER, and individual,

18 Defendants.
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20

CASE NO. 07cv00673 BTM(WMc)

**ORDER DENYING MOTION TO
DISMISS**

21
22 Defendants Fonda Hopkins and Frank Kryger have filed a motion to dismiss Plaintiffs'
23 second, third, and fifth claims for relief. For the reasons discussed below, Defendants'
24 motion is **DENIED**.
25

26 **DISCUSSION**

27 The parties are familiar with the facts, which need not be repeated here. Defendants
28 move to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs' claims for breach of contract,
breach of the implied covenant of the implied covenant of good faith and fair dealing, and
violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq.
The Court denies Defendants' motion in its entirety.

A. Breach of Contract Claims

Defendants contend that the breach of contract claims must be dismissed because

1 Hopkins and Kryger, as individuals, were not parties to the February 2005 Agreement.
2 Defendants rely on two documents in support of their argument : (1) a one-page “translation”
3 setting forth terms of the February 2005 Agreement (Def.’s Ex. A); and (2) the September
4 2005 Settlement Agreement (Def.’s Ex. B).

5 The Court can consider Defendants’ exhibits because the Complaint refers to them
6 and Plaintiffs do not challenge their authenticity. See Branch v. Tunnell, 14 F.3d 449, 454
7 (9th Cir. 1994). However, contrary to Defendants’ claims, the documents do not establish
8 that Hopkins and Kryger were not parties to the February 2005 Agreement.

9 The one-page “translation” identifies terms of the February 2005 Agreement but does
10 not identify who the contracting parties are. The first sentence of the “translation” indicates
11 that the agreement pertains to payments “from the results of WG Best and Jakob Gerhardt
12 USA to Jakob Gerhardt Deutschland and Vonda Hopkins LLC,” but does not state that these
13 companies are the contracting parties.

14 The September 2005 Settlement Agreement, which purports to cancel the February
15 2005 Agreement, was between Fonda Hopkins, LLC, W.G. Best, JG USA, Jakob Gerhardt,
16 and Florida LLC, on the one hand, and Altmann and Jakob Gerhardt on the other. In the
17 “recitals” section, the Agreement states, “WHEREAS, the Parties allegedly entered into that
18 certain agreement dated February 20, 2005, a copy of which is attached hereto as Exhibit
19 A, as a means for resolving amounts due from Gerhardt USA to Gerhardt Germany for fiscal
20 years ending June 30, 2004 and thereafter.” Although this language seems to support
21 Defendants’ contention that Hopkins and Kryger were not parties to the February 2005
22 Agreement, it does not require this conclusion. The recital does not state that there were no
23 other parties to the February 2005 Agreement.

24 According to Plaintiffs, the February 2005 Agreement is an agreement between
25 shareholders of the U.S. subsidiaries (Jakob Gerhardt and Fonda Hopkins) and their agents
26 (Altmann and Kryger) to divide profits of the U.S. subsidiaries according to shareholdings.
27 Defendants disagree and argue that it would make little sense for the agreement to be
28 structured as alleged by Plaintiffs. However, who the contracting parties were is a factual

1 matter that is best left for summary judgment.

2
3 B. Unfair Competition Law

4 Defendants argue that Plaintiffs' § 17200 claim must be dismissed because Plaintiffs
5 are not consumers or Defendants' competitors. Defendants further argue that Plaintiffs have
6 failed to allege unlawful conduct supporting a § 17200 claim. Neither argument is
7 convincing.

8 Defendants' argument that Plaintiffs must be consumers or competitors to bring a §
9 17200 claim is not supported by California law. The Unfair Competition Law's scope is
10 "sweeping," allowing a court to enjoin "wrongful business conduct in whatever context such
11 activity might occur." Barquis v. Merchants Collection Assn., 7 Cal. 3d 94, 111 (1972). This
12 principle remains viable and is not affected by the holding in Cel-Tech Communications, Inc.
13 v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163 (1999).¹ Alch v. Superior Court, 122
14 Cal. App. 4th 339, 403 (2004).

15 Thus, plaintiffs who are neither competitors nor consumers may sue under § 17200.
16 In Alch, for example, the court held that television writers, who alleged that studios, networks,
17 and talent agencies maintained a system-wide policy of age discrimination, had stated a §
18 17200 claim and were not required to allege potential competitive harm or likely consumer
19 deception. Similarly, in Lanard Toys Ltd. v. Novelty, Inc., __ F. Supp. 2d __, 2007 WL
20 2580776 (C.D. Cal. 2007), the court held that the plaintiffs had stated a § 17200 claim based
21 on their allegations that the defendants had infringed their trade dress, even though the
22 defendants did not compete with plaintiffs.

23 Furthermore, Plaintiffs have alleged unlawful conduct in support of their § 17200
24 claim. Specifically, Plaintiffs have pled a fraud cause of action (which is not being challenged

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26 ¹ Cel-Tech held that when a plaintiff claims to have suffered injury from a direct
27 competitor's "unfair" act, the word "unfair" means "conduct that threatens an incipient
28 violation of an antitrust law, or violates the policy or spirit of one of those laws because its
effects are comparable to or the same as a violation of the law, or otherwise significantly
threatens or harms competition." Id. at 186. However, the court made it clear that its holding
was limited to the specific context of an action by a competitor alleging anticompetitive
practices. Id. at 186 n. 12.

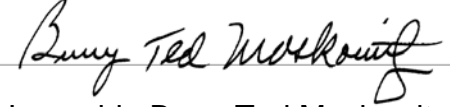
here). Practically any law or regulation, whether federal or state, statutory or common law, can serve as a predicate for a § 17200 “unlawful” violation. Paulus v. Bob Lynch Ford, Inc., 139 Cal. App. 4th 659, 681 (2006).² See also CRST Van Expedited, Inc. v. Werner Ent., Inc., 479 F.3d 1099 (9th Cir. 2007) (holding that the plaintiff had adequately pled that the defendant had engaged in an “unlawful” business practice, specifically intentional interference with employment contracts). Plaintiffs have alleged that Defendants violated a legal duty by way of their fraudulent conduct and, therefore, have adequately pled a § 17200 claim.³

CONCLUSION

For the reasons discussed above, Defendants’ motion to dismiss is **DENIED**.

IT IS SO ORDERED.

DATED: October 11, 2007


Honorable Barry Ted Moskowitz
United States District Judge

² Defendants rely on Microsoft Corp. Antitrust Lit., 274 F. Supp. 2d 747, 750 (D. Md. 2003) for the proposition that violations of common law cannot form the basis of a § 17200 claim alleging “unlawful” conduct. However, Microsoft is distinguishable. Microsoft addressed the issue of whether a breach of contract constitutes “unlawful” conduct because it violates the common law of California. In contrast, this case concerns alleged tortious activity in violation of California common law.

³ The Court need not and does not reach the issue of whether Plaintiffs have adequately pled “unfair” conduct.